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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARTIN VAZQUEZ,
CDCR #D-18168,

Plaintiff,

vs.

GEORGE A. NEOTTI; W. SUGLISH;
B. KOEN; PAYNE; R. DAVIS;
M. JANNUSH; HUBERT; SANCHEZ,

Defendants.

Civil No. 13cv1734 BEN (BGS)

ORDER:

**(1) GRANTING MOTION TO
ALLOW PLAINTIFF TO REFILE
42 U.S.C. § 1983 ACTION (ECF
No. 3.);**

**(2) GRANTING MOTION TO
PROCEED *IN FORMA*
PAUPERIS, IMPOSING NO
INITIAL PARTIAL FILING FEE,
GARNISHING \$400.00
BALANCE FROM PRISONER'S
TRUST ACCOUNT (ECF No. 5);
and**

**(3) DISMISSING COMPLAINT
FOR FAILING TO STATE A
CLAIM PURSUANT TO 28
U.S.C. §§ 1915(e)(2) AND 1915A(b)**

[Docket Nos. 3, 5]

Martin Vazquez ("Plaintiff"), a state prisoner currently incarcerated at Calipatria State Prison located in Calipatria, California and proceeding pro se, has submitted a civil action pursuant to 42 U.S.C. § 1983. Additionally, Plaintiff has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) (ECF No. 5), along with a "Motion to Allow Plaintiff to Re-File 42 U.S.C. § 1983" (ECF No. 3). In this Motion,

1 Plaintiff acknowledges that he filed the identical claims in a previous action that was
 2 dismissed, without prejudice, for failing to exhaust his administrative remedies pursuant
 3 to 42 U.S.C. § 1997e. (ECF No. 3 at 1-2.) The Court **GRANTS** Plaintiff's Motion and
 4 will allow him to file this action. However, the Court declines to rule on whether
 5 Plaintiff has properly exhausted his administrative remedies at this time. Because the
 6 failure to satisfy 42 U.S.C. § 1997e(a) is an affirmative defense, Defendants carry the
 7 burden of both "raising and proving the absence of exhaustion." *Wyatt v. Terhune*, 315
 8 F.3d 1108, 1119 (9th Cir. 2003).

I.

MOTION TO PROCEED IFP [ECF No. 5]

11 All parties instituting any civil action, suit or proceeding in any district court of
 12 the United States, except an application for writ of habeas corpus, must pay a filing fee
 13 of \$400. *See* 28 U.S.C. § 1914(a).¹ An action may proceed despite a plaintiff's failure
 14 to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to
 15 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).
 16 However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee
 17 in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C.
 18 § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

19 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
 20 ("PLRA"), a prisoner seeking leave to proceed IFP must submit a "certified copy of the
 21 trust fund account statement (or institutional equivalent) for the prisoner for the six-
 22 month period immediately preceding the filing of the complaint." 28 U.S.C. §
 23 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
 24 trust account statement, the Court must assess an initial payment of 20% of (a) the
 25 average monthly deposits in the account for the past six months, or (b) the average

26
 27 ¹ In addition to the \$350 statutory fee, all parties filing civil actions on or after
 28 May 1, 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a),
 (b); Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, eff. May
 1, 2013. However, the additional \$50 administrative fee is waived if the plaintiff is
 granted leave to proceed IFP. *Id.*

1 monthly balance in the account for the past six months, whichever is greater, unless the
 2 prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
 3 institution having custody of the prisoner must collect subsequent payments, assessed
 4 at 20% of the preceding month's income, in any month in which the prisoner's account
 5 exceeds \$10, and forward those payments to the Court until the entire filing fee is paid.
 6 *See* 28 U.S.C. § 1915(b)(2).

7 The Court finds that Plaintiff has no available funds from which to pay filing fees
 8 at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner
 9 be prohibited from bringing a civil action or appealing a civil action or criminal
 10 judgment for the reason that the prisoner has no assets and no means by which to pay the
 11 initial partial filing fee"); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4)
 12 acts as a "safety-valve" preventing dismissal of a prisoner's IFP case based solely on a
 13 "failure to pay . . . due to the lack of funds available to him when payment is ordered").
 14 Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [ECF No. 5] and
 15 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$400
 16 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the
 17 Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

18 II.

19 INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)

20 Notwithstanding IFP status or the payment of any partial filing fees, the Court
 21 must subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory
 22 screening and order the sua sponte dismissal of any case it finds "frivolous, malicious,
 23 failing to state a claim upon which relief may be granted, or seeking monetary relief from
 24 a defendant immune from such relief." 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254
 25 F.3d 845, 845 (9th Cir. 2001) ("[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not
 26 limited to prisoners."); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
 27 (noting that 28 U.S.C. § 1915(e) "not only permits but requires" the court to sua sponte
 28 dismiss an *in forma pauperis* complaint that fails to state a claim).

Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua sponte dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130. However, as amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an action filed pursuant to the IFP provisions of section 1915 make and rule on its own motion to dismiss before directing the U.S. Marshal to effect service pursuant to Federal Rule of Civil Procedure 4(c)(3). *See Calhoun*, 254 F.3d at 845; *Lopez*, 203 F.3d at 1127; *see also McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th Cir. 1997) (stating that sua sponte screening pursuant to § 1915 should occur “before service of process is made on the opposing parties”).

“[W]hen determining whether a complaint states a claim, a court must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”; *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988), which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

A. 1983 Standard

Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person acting under color of state law committed the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 643 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

1 **B. Conspiracy Claims**

2 In his Complaint, Plaintiff makes broad allegations of conspiracy by some of the
3 named Defendants. “To state a cause of action under § 1985(3), a complaint must allege
4 (1) a conspiracy, (2) to deprive any person or a class of persons the equal protection of
5 the laws, or of equal privileges and immunities under the laws, (3) an act by one of the
6 conspirators in furtherance of the conspiracy, and (4) a personal injury, property damage
7 or a deprivation of any right or privilege of a citizen of the United States.” *Gillespie v.*
8 *Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980); *see also Griffin v. Breckenridge*, 403 U.S.
9 88, 102-03 (1971); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992).
10 “[T]he language requiring intent to deprive *equal* protection . . . means that there must
11 be some racial, or perhaps otherwise class-based, invidiously discriminatory animus
12 behind the conspirators’ action.” *Griffin*, 403 U.S. at 102; *see also Sever*, 978 F.2d at
13 1536.

14 Here, Plaintiff fails to allege membership in a protected class and fails to allege
15 that any Defendant acted with class-based animus, both of which are essential elements
16 of a cause of action under 42 U.S.C. § 1985(3). *See Griffin*, 403 U.S. at 101-02; *Schultz*
17 *v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (holding that conspiracy plaintiff must
18 show membership in a judicially-designated suspect or quasi-suspect class); *Portman v.*
19 *Cnty. of Santa Clara*, 995 F.2d 898, 909 (9th Cir. 1993). Therefore, Plaintiff’s
20 conspiracy claims must be dismissed for failing to state a claim upon which relief may
21 be granted.

22 **C. Eighth Amendment Claims**

23 Plaintiff’s only allegations against Defendant Jannush is that he handcuffed inmate
24 Osborn, another inmate that Plaintiff later admits he attacked. (*See Compl.* at 8.) The
25 Eighth Amendment, which prohibits “cruel and unusual punishments,” imposes a duty
26 on prison officials to provide humane conditions of confinement and to take reasonable
27 measures to guarantee the safety of the inmates. *Helling v. McKinney*, 509 U.S. 25, 31-
28 33 (1993). However, every injury suffered by an inmate does not necessarily translate

1 into constitutional liability for prison officials. *Osolinski v. Kane*, 92 F.3d 934, 936-37
 2 (9th Cir. 1996); *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981) (noting that the U.S.
 3 Constitution “does not mandate comfortable prisons”).

4 Thus, to assert an Eighth Amendment claim for deprivation of humane conditions
 5 of confinement, a prisoner must satisfy two requirements: one objective and one
 6 subjective. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Allen v. Sakai*, 48 F.3d 1082,
 7 1087 (9th Cir. 1994). Under the objective requirement, the plaintiff must allege facts
 8 sufficient to show that “a prison official’s acts or omissions . . . result[ed] in the denial
 9 of the ‘minimal civilized measure of life’s necessities.’” *Farmer*, 511 U.S. at 834
 10 (quoting *Rhodes*, 452 U.S. at 347). This objective component is satisfied so long as the
 11 institution “furnishes sentenced prisoners with adequate food, clothing, shelter,
 12 sanitation, medical care, and personal safety.” *Hoptowit v. Ray*, 682 F.2d 1237, 1246
 13 (9th Cir. 1982); *see also Farmer*, 511 U.S. at 534; *Wright v. Rushen*, 642 F.2d 1129,
 14 1132-33 (9th Cir. 1981). The subjective requirement, relating to the defendant’s state
 15 of mind, requires that the plaintiff allege facts sufficient to show “deliberate
 16 indifference.” *Allen*, 48 F.3d at 1087. “Deliberate indifference” exists when a prison
 17 official “knows of and disregards an excessive risk to inmate health and safety; the
 18 official must be both aware of facts from which the inference could be drawn that a
 19 substantial risk of serious harm exists, and he must also draw the inference.” *Farmer*,
 20 511 U.S. at 837.

21 Here, there are no facts alleged that would show Defendant Jannush knew of any
 22 “excessive risk” to Plaintiff’s health or safety. Accordingly, Plaintiff’s Eighth
 23 Amendment claims against Defendant Jannush are dismissed for failing to state a claim
 24 upon which § 1983 relief can be granted.

25 **D. Respondeat Superior**

26 Finally, to the extent Plaintiff seeks to sue Defendants based merely on their
 27 supervisory positions, such allegations are insufficient to state a claim against these
 28 Defendants because there is no respondeat superior liability under 42 U.S.C. § 1983.

1 *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). Instead, “[t]he inquiry into
 2 causation must be individualized and focus on the duties and responsibilities of each
 3 individual defendant whose acts or omissions are alleged to have caused a constitutional
 4 deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*,
 5 423 U.S. 362, 370-71 (1976)). In order to avoid the respondeat superior bar, Plaintiff
 6 must allege personal acts by each individual Defendant which have a direct causal
 7 connection to the constitutional violation at issue. *See Sanders v. Kennedy*, 794 F.2d
 8 478, 483 (9th Cir. 1986); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

9 Supervisory prison officials may only be held liable for the allegedly
 10 unconstitutional violations of a subordinate if Plaintiff sets forth allegations which show:
 11 (1) how or to what extent they personally participated in or directed a subordinate’s
 12 actions, and (2) in either acting or failing to act, they were an actual and proximate cause
 13 of the deprivation of Plaintiff’s constitutional rights. *Johnson v. Duffy*, 588 F.2d 740,
 14 743 (9th Cir. 1978). As currently pleaded, however, Plaintiff’s Complaint fails to set
 15 forth facts which might be liberally construed to support an individualized constitutional
 16 claim against Defendant Neotti.

17 Therefore, the Court finds that Plaintiff’s Complaint must be **DISMISSED**
 18 without prejudice for failing to state a claim upon which relief can be granted. *See* 28
 19 U.S.C. §§ 1915(e)(2) and 1915A(b)(1).

20 **III.**

21 **CONCLUSION AND ORDER**

22 Good cause appearing, **IT IS HEREBY ORDERED** that:

23 1. Plaintiff’s “Motion to Allow Plaintiff to Re-File 42 U.S.C. § 1983” action
 24 (ECF No. 3) is **GRANTED**.

25 2. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No.
 26 5] is **GRANTED**.

27 3. The Secretary of California Department of Corrections and Rehabilitation,
 28 or his designee, shall collect from Plaintiff’s prison trust account the \$400 balance of the

1 filing fee owed in this case by collecting monthly payments from the account in an
2 amount equal to twenty percent (20%) of the preceding month's income and forward
3 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
4 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY
5 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

6 4. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey
7 Beard, Ph.D., Secretary, California Department of Corrections and Rehabilitation, 1515
8 S Street, Suite 502, Sacramento, California 95814.

9 **IT IS FURTHER ORDERED** that:

10 5. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28
11 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty-five (45)
12 days leave from the date this Order is "Filed" in which to file a First Amended
13 Complaint which cures all the deficiencies of pleading noted above. Plaintiff's
14 Amended Complaint must be complete in itself without reference to the superseded
15 pleading. *See* S.D. CAL. CIV. L. R. 15.1. Defendants not named and all claims not re-
16 alleged in the Amended Complaint will be deemed to have been waived. *See King v.*
17 *Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint
18 fails to state a claim upon which relief may be granted, it may be dismissed without
19 further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C.
20 § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

21 6. The Clerk of Court is directed to mail Plaintiff a Court approved civil rights
22 § 1983 form complaint.

23 **IT IS SO ORDERED.**

24
25 DATED: 10/16/13

26 
27 **HON. ROGER T. BENITEZ**
28 United States District Court